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No. 07-501

IN THE
Supreme Court of the United States

MARILYN SHIRLEY AND RAYMOND DOUGLAS SHIRLEY,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF STOP PRISONER RAPE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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November 9, 2007

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INTEREST OF *AMICUS CURIAE*[1]

Stop Prisoner Rape (SPR) is the only organization in the United States exclusively dedicated to putting an end to sexual violence against men, women, and youth in all forms of detention. To achieve this goal, SPR seeks to: engender policies that ensure government accountability for prisoner rape; change ill-informed and flippant public attitudes toward sexual assault behind bars; and promote access to resources for survivors of this type of violence.

The work of SPR was critical in securing the passage of the Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601 *et seq.*, and SPR has since led the call to ensure the law's full implementation. The organization's professional staff of lawyers, social workers, and journalists regularly provide expertise to lawmakers, corrections officials, counselors, advocates, and reporters. Given its unique expertise and experience, SPR believes its perspective would be helpful to this Court in determining whether to grant a writ of certiorari in this case.

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* states that no counsel for any party to this dispute authored this motion or this brief in whole or in part and no person or entity other than *Amicus Curiae* made a monetary contribution to the preparation or submission of this motion or this brief.

In accordance with Rule 37.2(a), *Amicus Curiae* notified the parties of its intent to file a brief on October 29, 2007. Counsel for both parties consented to this filing in separate facsimiles dated October 30, 2007.

SUMMARY OF ARGUMENT

SPR urges the Court to grant *certiorari* in this case to assess whether the scope of employment for a federal law enforcement official should be determined by federal law, such that the exception to sovereign immunity in the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680(h), applies consistently throughout the country.

Law enforcement officers in general, and corrections officials in particular, are vested with unique and extraordinary authority as part of their employment. Federal inmates cannot leave the watch of Bureau of Prison officials and must comply with all of the officers' orders to avoid disciplinary action. By abusing their authority, the worst officials have been able to rape or otherwise sexually assault inmates in their charge.

The need for the law enforcement exception in § 2680(h) when officials abuse their authority to commit custodial sexual abuse is on all fours with the reasoning Congress provided for the exception. Like the victims of the no-knock raids that inspired the amendment, federal inmates who are raped by Bureau of Prison officials have no effective remedy other than an FTCA action for the intentional abuses inflicted upon them. Individual officers (like the one whose actions underlie this petition) are generally judgment proof and, as an officer's actions are not tied to criminal proceedings against the prisoner, a prisoner rape survivor has no other legal

remedy, such as the exclusion of evidence. The lack of redress is particularly troubling in light of the serious long-term consequences of prisoner rape, including post-traumatic stress disorder, depression, exacerbation of pre-existing psychiatric conditions, suicidal ideation, pregnancy, and HIV.

Finally the inconsistent analysis resulting from a state law standard for scope of employment conflicts with the spirit of federal law, namely the Prison Rape Elimination Act (PREA) of 2003, 42 U.S.C. § 15601 *et seq*. PREA requires corrections facilities to develop a zero-tolerance approach to sexual violence and seeks to increase accountability of officials and protect the constitutional rights of inmates. Without a standard ensuring that the Government can be held liable for the intentional sexual abuse committed by on-duty BOP officers, prisoner rape survivors have no incentive to report abuse and the goals of PREA will be thwarted.

ARGUMENT

I. This Court Should Consider Whether the Federal Tort Claims Act Requires a Uniform Federal Standard for "Scope of Employment" That Takes Account of the Unique Authority Granted to Law Enforcement Officers, Including Corrections Officials.

Because of their employment with the United States, Bureau of Prison (BOP) officials have complete control over a federal prisoner's day-to-day life. Inmates cannot leave the area that the officer is guarding, must submit to searches by the officer, are watched by officers even in states of undress, and are required to follow officers' orders.

The authority vested in BOP officials enables the worst of these officers to rape inmates who they are charged with protecting. Refusing the order of a corrections official can result in a disciplinary infraction, solitary confinement, restrictions on family contact, removal from programs, and/or a loss of "good time." Thus, while in the typical tort, both parties have the means to leave the location and refuse the other person's demands, inmates receiving orders from corrections officials cannot do so.

Reliable estimates of the incidence of sexual violence in detention are difficult to obtain, due in part to the challenges of collecting data in a climate of fear of retaliation and stigma. Research suggests that as many as 20 percent of male prisoners have been pressured or coerced into sex, and ten percent

have been raped.[2] *See* Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. Sex Res. 67 (1996); *see also* Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 Prison J. 379, 383 (2000). In one women's facility, more than a quarter of the women studied said they had been pressured into sex. *See* Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prison*, 39 J. Sex Res. 217, 220 (2002). Women inmates are most vulnerable to sexual assault perpetrated by male officers. *See* Amnesty International, *Abuse of Women in Custody: Sexual Misconduct and Shackling of Pregnant Women* 17 (2001); Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret*, 18 Yale L. & Pol. Rev. 195, 202-03 (1999).

While fear of future attacks causes many prisoner rape survivors to remain silent about their abuse, each year, the BOP receives more than 200 complaints alleging staff sexual misconduct in federal prisons. *See* Allen J. Beck, Paige M. Harrison & Devon B. Adams, Bureau of Justice Statistics, *Sexual Violence Reported by Correctional Authorities, 2006* at 14 (2007); Allen J. Beck & Paige M. Harrison, Bureau of Justice Statistics, *Sexual Violence Reported by Correctional Authorities, 2005* at 14 (2006); Allen J. Beck & Timothy A. Hughes, Bureau

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[2] These statistics include both staff-on-inmate and inmate-on-inmate sexual violence.

of Justice Statistics, *Sexual Violence Reported by Correctional Authorities, 2004* at 14 (2005). As the statisticians acknowledged, "due to the fear of reprisal from perpetrators, a code of silence among inmates, personal embarrassment, and lack of trust in staff victims are often reluctant to report incidents to correctional authorities," Beck & Hughes, *supra*, at 2, and the actual incidence rate is likely much higher. According to Kathleen Hawk Sawyer, former Director of the BOP, sexual abuse of inmates was the biggest problem she faced as Director. *See* Nat'l Inst. Of Corrections, Dept. of Justice, *Addressing Staff Sexual Misconduct with Offenders, Remote Conference for Investigating and Preventing Staff Sexual Misconduct in a Corrections Setting* (2001), *cited in* Office of the Inspector General, Dept. of Justice, *Deterring Staff Sexual Abuse of Federal Inmates* 4 (2005).

The BOP has recognized custodial sexual abuse as an employment matter for federal law enforcement officers. It has developed a program statement pertaining to sexual violence prevention and mandates sexual violence awareness training. *See* Federal Bureau of Prisons, Program Statement 5324.06, *Sexually Abusive Behavior Prevention and Intervention Program* (2005), *available on-line at* http://www.bop.gov/policy/progstat/5324_006.pdf (last visited Nov. 6, 2007). While not focused exclusively on staff-on-inmate sexual assaults, the policy (in accordance with federal criminal law, *see* 18 U.S.C. § 2243) states that "except in cases where staff are clearly the victim of inmate sexually abusive behavior, sexual behavior between staff and in-

mates is **always** the staff member's responsibility." *Id.* at ¶ 7(b) (emphasis in original).

In part because of the fear of reporting, few prisoner rape survivors file tort actions in court. As a result, many states, including Texas, do not have case law directly addressing sexual abuse by corrections officials. As laid out in the Petition, among the states that have considered the scope of employment for law enforcement officials, the courts' analyses and conclusions have been divided. *See* Pet. at 22-27.

While not authorized or condoned by the United States, prisoner rape and other forms of custodial sexual misconduct against inmates in federal prisons arises from the authority that the United States grants to corrections officials in their employment with the Bureau of Prisons. Some corrections officials have relied on their responsibility for establishing and maintaining physical and psychological control over inmates to abuse their authority and rape inmates in their charge.

II. The Court Should Evaluate the Applicability of the Law Enforcement Exception in 28 U.S.C. § 2680(h) to BOP Officials who Rape Federal Inmates.

As discussed in the Petition, the Federal Tort Claims Act explicitly recognizes the increased government liability when an assault is committed by a law enforcement officer. *See* 28 U.S.C. § 2680(h); *see also* Pet. at 5-6. Congress passed § 2680(h) in response to "abusive, illegal and unconstitutional 'no-knock' raids" by Federal narcotics agents. S. Rep. 93-588 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2789,

2790. In the most notorious of these raids, Justice Department agents, without warrants, kicked in the doors of two houses, shouted obscenities, and threatened the occupants with drawn weapons, leaving only once they realized they had entered the wrong homes. *Id.*

Recognizing that the victims in these cases lacked any legal remedy against the Government, and that individual agents were generally judgment proof, Congress sought to "deprive the Federal Government of the defense of sovereign immunity in cases in which federal law enforcement agents, acting within the scope of their employment, or under color of federal law, commit ... assault [and other enumerated torts]." S. Rep. 93-588, *supra.*

Like the agents who conducted the illegal no-knock raids inspiring the 1974 amendment, the Bureau of Prisons official who raped Petitioner relied on the authority that the United States bestowed upon him in his employment as a federal corrections officer. Specifically, he was able to use his responsibility for establishing and maintaining physical and psychological control over inmates to bring Petitioner to an isolated location and force her to engage in sex acts. Identical to the concerns raised by Congress in § 2680(h), the officer was found liable under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), but, because he is judgment proof, Petitioner has not been able to obtain any relief.

Corrections officials present a striking example of the authority that law enforcement agents may have over citizens. A police officer's power to use force to

detain or search an individual is constitutionally sharply limited by the Fourth Amendment, while a corrections official's job is to maintain control over the prisoners in his charge and is subject to only very lenient Eighth Amendment limitations.

Inmates who are raped by BOP officials have "no effective legal remedy against the Federal Government for the actual physical damage, mu[ch] less the pain, suffering and humiliation to which [they] have been subjected." S. Rep. 93-588, *supra*. The physical and emotional damages that prisoner rape survivors endure are typically even more severe than those experienced by the victims of the illegal no-knock raids. Survivors of sexual violence in detention often develop long-term psychological problems, such as post-traumatic stress disorder, depression, exacerbation of pre-existing psychiatric conditions, and suicidal ideation. *See* Robert W. Dumond, *The Impact of Prisoner Sexual Violence: Challenges of Implementing Public Law 108-79 – The Prison Rape Elimination Act of 2003*, 32 J. Legis. 142, 151 (2006). They are also placed at serious risk for becoming pregnant and contracting sexually transmitted diseases, including HIV.

In enacting § 2680(h) Congress noted the injustice that, "under the Federal Torts Claims Act, a Federal mail truck driver creates direct federal liability if he negligently runs down a citizen on the street but the Federal Government is held harmless if a federal narcotics agent intentionally assaults that same citizen in the course of an illegal 'no-knock' raid." S. Rep. 93-588, *supra*. The disparity is

equally apparent here. Under the Fifth Circuit's reasoning, the United States government may be liable when an officer negligently houses an inmate unsafely, *see, e.g., Sandoval v. United States*, 980 F.2d 1057 (5th Cir. 1993), but not when the officer sexually assaults the same inmate.

III. This Court Should Consider Whether Applying Inconsistent State Law Standards to Determine Scope of Employment Conflicts with Federal Law Addressing Custodial Sexual Abuse.

As detailed in the Petition, the reliance on state law to determine whether intentional misconduct is within the scope of employment has resulted in United States liability for the sexual abuse committed by federal law enforcement officials being based, in part, on the jurisdiction in which the abuse occurred. *See* Pet. at 22-26. The application of inconsistent state law standards on scope of employment conflict with the intent of the Prison Rape Elimination Act (PREA), 42 U.S.C. § 15601 *et seq*.

PREA was unanimously passed by a bipartisan Congress in 2003 and requires that detention facilities adopt a zero-tolerance approach to sexual assault in detention. 42 U.S.C. § 15602(1). Among its stated purposes, PREA seeks to "increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape" and "protect the Eighth Amendment rights of Federal ... prisoners." 42 U.S.C. § 15602 (6),(7).

As discussed above, *see supra* Section I, prisoner rape survivors are often fearful of reporting custodial

sexual abuse because of the likelihood of retaliation, further abuse, segregation, and other punitive conditions. Without a federal standard for Government liability for this abuse, prisoner rape survivors in federal facilities have no incentive to report abuse.

In the rare instances where injunctive relief is available, these remedies may ultimately help prevent further abuse, but do not compensate for the harm already done. Penalties against the perpetrator are also rare. In cases of substantiated custodial sexual misconduct in federal and state prisons, the offending official was referred for prosecution only 39 percent of the time,[3] and only 33 percent were formally discharged from employment.[4] *See* Beck, Harrison, & Adams, *supra,* at 9, table 2.

Aware of the risks that come with reporting, and with no clear indication that, even once their case gets to court, there will be any relief, federal inmates who have been sexually assaulted are implicitly encouraged to remain silent about the abuse. As discussed in Section II, *supra,* Bivens actions against individual officials are generally hollow victories that neither provide financial relief nor create an incentive for facilities to be more diligent in their hiring and supervising of officials.

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[3] The federal custodial sexual misconduct law, 18 U.S.C. § 2243, makes it a crime for an officer to have sexual contact with an inmate, regardless of consent.

[4] Thirty-seven percent of staff resigned prior to investigation and another ten percent resigned after investigation. *See* Beck, Harrison, & Adams, *supra,* at 9, table 2.

More important, without a consistent standard recognizing that sexual abuse committed by on-duty BOP staff is within the scope of employment – such that the United States may be held liable – prisoners are implicitly told that the BOP may escape responsibility for one of the most egregious abuses that occurs in its facilities. This inconsistency greatly undermines PREA's stated goals of encouraging corrections authorities to prioritize the prevention of prisoner rape, increase accountability, and protect inmates' constitutional right to be free from sexual abuse. *See* 42 U.S.C. § 15602 (2), (6), (7).

CONCLUSION

For the reasons stated above and in the Petition, this Court should accept this case for review.

Respectfully submitted,

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